Petitioner's statement of law regarding the standard for equal protection claims under both the United States Constitution and the Louisiana Constitution in his Petition for Writ of Certiorari were correct. In order to recover, petitioner must show he was treated differently than a similarly situated individual and that the reason for the different treatment was not rationally related to the employer's motive. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000). Mr. Smith has failed to present any evidence that he was qualified for the position of Grounds Maintenance Supervisor or that his equal protection rights under either the United States Constitution or Louisiana Constitution were violated by the denial of the promotion.

Jefferson Parish did not violate Mr. Smith's equal protection rights because they treated all candidates the same. Pursuant to Personnel Rule VII, Jefferson Parish certified six candidates as being qualified for the position of Grounds Maintenance Supervisor. Petitioner was included in the list of certified candidates. Mr. Smith, as well as all other certified candidates, interviewed for the position. During the interview, all applicants were asked about an identical position at Lafreniere Park which was also vacant. However, petitioner refused to answer any questions regarding the other position at Lafreniere Park.

During the interview, petitioner was informed the department was seeking a change in management generally, a new leadership direction and greater efficiency in light of increased overtime payments. Petitioner failed to identify solutions to address the overtime payments or increase efficiency in department activities. He only offered one new idea and did not respond with suggestions designed to change the management of the department.

Following the interview, Mr. Muhoberac was promoted to the Grounds Maintenance Supervisor position because he was the best qualified candidate.

Clearly, Mr. Smith was not qualified for the position as he did not fully participate in the interview process. He removed himself from consideration by his own actions of refusing to answer questions in the interview process. Therefore, Mr. Smith cannot establish a violation of his equal protection rights under either the United States Constitution or the Louisiana Constitution.

II. THERE IS NO SPLIT AMONG THE CIRCUITS RELATIVE TO PROVING PRETEXT IN A DISCRIMINATION CASE

Petitioner states there is a split among the circuits relative to proving pretext in a discrimination case. However, this assertion is simply untrue. This Court resolved the split amongst the circuits when *Reeves v. Sanderson Plumbing Products, Inc.,* was decided. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

In *Reeves*, this court explicitly stated certiorari was granted to resolve the conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, was adequate to sustain a finding of liability for intentional discrimination. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109.

In *Reeves*, this Court noted the allocation of the burden of proof under *McDonnell Douglas* and the order for the presentation of proof in discriminatory-treatment cases. While petitioner is correct that the Fifth Circuit previously required a plaintiff to produce evidence that the employer's reason was false and the real reason was discrimination and a split in the circuits arose, said reasoning was expressly rejected and the split was resolved by this Court in *Reeves*. *Reeves*, 530 U.S. at 141, 120 S.Ct. at 2106.

Reeves stands for the proposition that a plaintiff's prima facie case, when combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude the employer unlawfully discriminated through an inference. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. *Reeves* acknowledges instances where a plaintiff may present evidence demonstrating an employer discriminated against him, but the employer would be entitled to judgment as a matter of law, if the record conclusively revealed some nondiscriminatory reason for the employer's decision. *Id*. Finally, this Court held that discrimination cases should not be treated differently than cases involving ultimate questions of fact. *Id.*

In his Petition for Writ of Certiorari at Page 16, petitioner asserts in Title VII cases, the Fifth Circuit Court of Appeals "requires a conflict in substantial evidence to create a jury question." However, this is a misstatement of the law because petitioner's reliance upon *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), as the latest jurisprudential statement by the Fifth Circuit is incorrect. The most current statement regarding Title

VII cases in the Fifth Circuit is *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), which cites *Reeves*.

Here, the petitioner's actions during the interview process demonstrate the reasons he was denied the promotion. His subsequent pattern of behavior with repeated violations following the denial for the promotion demonstrate the reasons he was ultimately terminated. Given the petitioner's actions and the legitimate reasons put forth by the defendants regarding his failed promotion and termination, petitioner could not produce evidence sufficient to permit the trier of fact to conclude the defendants' motive was false, thereby creating an inference of pretext. As Judge Lemelle stated in his reasons for ruling, no fact finder could reasonably conclude from the evidence presented that the decision not to promote Smith was driven by discrimination animus. See Judgment of the District Court, Appendix C of the Petition for Writ of Certiorari filed by Norris Smith. There was no basis for the lower courts or any fact finder to infer the defendants unlawfully discriminated against the petitioner. Therefore, the decisions of the lower courts granting defendants' motion for summary judgment and denying petitioner's motion for summary judgment were correct.

Since the theme of the petitioner's argument in support of granting certiorari is the holding of *Reeves* and there is no split in the circuits, petitioner failed to present any reason for this Court to grant certiorari on the issue of inferring pretext in an employment discrimination case.

III. THE FIFTH CIRCUIT WAS CORRECT IN AFFIRMING THE DECISION OF THE DISTRICT COURT WHICH GRANTED JEFFERSON PARISH'S MOTION FOR SUMMARY JUDGMENT AND DENIED PETITIONER'S MOTION FOR SUMMARY JUDGMENT

In his Petition for Writ of Certiorari, petitioner alleges that cross motions for summary judgment are inherently contradictory for proving pretext in discrimination claims. This argument is incorrect and as previously discussed, there is no split in the circuits regarding the manner in which a party may establish an inference of pretext in an employment discrimination case.

Summary judgment is granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule of Civil Proc. 56(c); *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the non-moving party will bear the burden of proof at trial on the dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an essential element to that party's case in order to survive summary judgment. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. Where the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt to the material facts. *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). The non-moving party must come forward with specific facts showing there is a genuine issue for trial.

Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356. The mere existence of a scintilla of evidence on the non-moving party's position is insufficient to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511, 477 U.S. 242, 252 (1986). "Absent countervailing evidence, the trier of fact must accept the defendant's explanation as the real reason." *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1295 (5th Cir. 1994), citing, *Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991). The non-moving party must present evidence upon which a reasonable jury could reasonably find for the plaintiff.

Petitioner alleges that cross motions for summary judgment are inherently contradictory because a court cannot find that issues of material fact exist as a basis for denying one motion while granting another party's motion on the same grounds. This statement is correct, but the argument is not applicable to the case before this Court. Here, Jefferson Parish's Motion for Summary Judgment was granted because the petitioner was unable to demonstrate facts which established pretext, thereby supporting his chance for recovery. Petitioner's Motion for Summary Judgment was denied because he was not entitled to judgment as a matter of law – meaning he could not produce countervailing evidence to refute Jefferson Parish's explanation for the denied promotion or subsequent termination.

There is no contradiction for a court to deny a motion for summary judgment to one party while granting summary judgment to another party. When a motion for summary judgment, like the petitioner's, is filed and is based on facts insufficient to demonstrate he is entitled to judgment as a matter of law, it should be denied because a

party is granted summary judgment only in instances where there are no issues of fact.

Petitioner further alleges summary judgment is improper in cases involving employment discrimination. This argument is also incorrect. Summary judgment is based on the elements of an underlying claim. In *Amburgey v. Cohart Refractories Corporation, Inc.*, the Fifth Circuit stated summary judgment should be considered in an employment discrimination case and denied, only, if the plaintiff can raise an issue of fact regarding pretext. *Amburgey v. Cohart Refractories Corporation, Inc.*, 936 F.2d 805, 813 (5th Cir. 1991). Pretext cannot be established by mere "conclusory statements" of a plaintiff who feels he has been discriminated against. *Id.*, citing, *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 976 (5th Cir. 1984).

In *Amburgey*, the court stated the following:

> [T]he salutary function of summary judgment in the employment discrimination arena [is that] summary judgment allows patently meritless cases to be nipped in the bud. . . . Where there is only an 'attenuated possibility that a jury would infer a discriminatory motive' . . . proceeding . . . serves no useful function. The problem, however, is that there is no bright line demarcating when a 'genuine issue of fact' degenerates into an 'attenuated possibility.' *Id.*, citing, *Thornbrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 645 (5th Cir. 1985).

Contrary to the petitioner's claims, the Fifth Circuit provides for the denial of a motion for summary judgment in an employment discrimination case if there exists the possibility of a jury drawing a contrary inference sufficient

to create a dispute as to a material fact. See *Amburgey, supra*; *Thornbrough, supra*; see also, *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369 (5th Cir. 1980).

Finally, petitioner alleges the statements he submitted and candidates' qualifications for the promotion demonstrated issues of material fact which precluded summary judgment. The statements were inadmissible because they contained procedural defects.[1] Because the petitioner presented inadmissible statements which were self-serving conclusory statements incapable of creating issues of material fact, the Fifth Circuit affirmed the district court's decision to grant Jefferson Parish's Motion for Summary Judgment and deny petitioner's motion.

Since there is no split in the circuits regarding an inference of pretext, no contradiction regarding cross motions for summary judgment and summary judgments is available in employment discrimination cases, Mr. Smith's writ for certiorari should be denied.

IV. THE FIFTH CIRCUIT WAS CORRECT IN AFFIRMING THE DECISION OF THE DISTRICT COURT WHICH DENIED ADMISSION OF THE UNSWORN STATEMENTS PRESENTED BY PETITIONER BECAUSE THEY WERE NOT RELIABLE EVIDENCE CAPABLE OF CREATING ISSUES OF MATERIAL FACT

Mr. Smith contends the lower courts erred in holding that written statements made by other employees regarding racial animus were inadmissible because they were not

[1] The admissibility of the statements presented by the petitioner is discussed more fully in the following section IV.

notarized. His assertion that the written statements he offered should have been admissible as "evidence of other wrongs" is clearly erroneous.

To defeat a motion for summary judgment, Federal Rule of Civil Procedure 56(c) requires the non-moving party to go beyond the pleadings, and by affidavit or depositions, answers to interrogatories and admissions on file, to designate specific facts showing that there is a genuine issue for trial. *Celotex, supra*, 477 U.S. at 322. Furthermore, an unsworn statement does not meet the requirements of Fed. Rule of Civ. Proc. 56(e). See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158, 90 S.Ct. 1598, 1609 (1970).

The statements of Larry Bordelon, John Jenkins and Sandon Bell were unsworn and signed without the penalty of perjury. The statements failed to comply with the requirements of 28 U.S.C. § 1746, which provides that unsworn declarations made under penalty of perjury would be admissible. These statements were inadmissible for any purpose in this case because their form was improper and not reliable. They did not qualify as affidavits under Fed. Rule Civ. Proc. 56(e) and were similar to the statements in *Adickes*. Thus, they were inadmissible for any purpose and incapable of creating issues of material fact.

Furthermore, the reason the petitioner sought to introduce the statements is irrelevant because they are procedurally defective and are unreliable. Even though the statements were inadmissible, the district court reviewed the statements and concluded they were insufficient to create issues of material fact. See Judgment of the District Court, Appendix C of the Petition for Writ of Certiorari

filed by Norris Smith. Based on the issues of reliability and procedural defects, the lower courts properly denied use of these statements for any purpose. Therefore, certiorari should not be granted.

V. SUMMARY JUDGMENT DOES NOT VIOLATE A PARTY'S CONSTITUTIONAL RIGHT TO A TRIAL BY JURY

Petitioner alleges summary judgment is a procedural device, which denies a party's right to his day in court and a trial by a jury of his peers. This argument is completely without merit and should be dismissed as such.

Petitioner cites numerous cases which identify axiomatic principles of law that form the basis for a right to a trial by jury. The cases petitioner cites do stand for those axiomatic principles, but not one of the cited cases stands for the principle that the use of summary judgment denies a party his right to a jury trial. Furthermore, under petitioner's theory of the right to a trial by jury, summary judgment is not the only procedural device contained in the federal rules which would deny a party his right to a jury trial. A motion to dismiss for failure to state a claim upon which relief could be granted also denies a party a right to a jury trial. A motion for a directed verdict at the end of a case removes the issue from a jury. Finally, under petitioner's theory, every party would be entitled to having a case go to trial for a jury to decide the merits.

Petitioner's argument is flawed because all of the abovementioned procedural devices are used to promote judicial economy and clear a court's docket of cases which a party is not entitled to recover. Stated a different way, summary judgment is an effective way of dismissing a case

where no reasonable party could find for the non-moving party. Clearly petitioner's argument regarding summary judgment violating a person's right to a jury is frivolous. Therefore, a writ for certiorari should not be granted to address it.

CONCLUSION

The lower courts' decisions were correct. There exists no split in the circuits regarding inferences of pretext or the use of summary judgments. Furthermore, petitioner's arguments regarding cross motions for summary judgment, admissibility of unsworn statements and summary judgment violating a right to a jury trial are all frivolous and lack any merit. Based on the foregoing, the Petition for Writ of Certiorari filed by Norris Smith should be denied.

Respectfully submitted,

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